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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDY DALE SPEER,

Defendant and Appellant.

2d Crim. No. B207934  
(Super. Ct. No. VC 2007010490)  
(Ventura County)

Eddy Dale Speer appeals from judgment after conviction by jury of attempted second degree robbery. (Pen. Code, §§ 211, 664.)<sup>1</sup> The jury found true an allegation that appellant used a knife in the commission of the crime. (§ 12022, subd. (b)(1).) In a bifurcated bench trial, the court found true allegations that appellant suffered prior serious felony convictions for bank robbery (18 U.S.C. § 2113 (a)) and for robbery (§ 211) within the meaning of sections 667, subdivision (a)(1), 1192.7, subdivision (c) and 1170.12, subdivisions (b)(2) and (c)(2). The trial court sentenced appellant to 25 years to life in state prison with the possibility of parole for the attempted robbery (§§ 667, subd. (e)(2), 1170.12, subds. (b)(2) & (c)(2)) and two consecutive five year prison terms for the prior serious felony convictions (§ 667,

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<sup>1</sup> All statutory references are to the Penal code unless otherwise stated.

subd. (a)(1)) and a consecutive one year prison term for use of the knife. (§ 12022, subd. (b)(1).) We affirm.

We appointed counsel to represent appellant on appeal. After examining the record, counsel filed an opening brief in this court raising no issues and requested that we independently examine the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On September 16, 2008, we advised appellant that he had 30 days in which to submit a written brief or letter stating any contentions or arguments he wished us to consider. Appellant filed a timely supplemental brief. He contends that his conviction must be reversed because his trial was tainted by impermissibly suggestive photographic lineups and he was denied a physical line-up, that the eyewitness identification testimony was tainted by an accidental pretrial show up, and that his counsel rendered ineffective assistance of counsel by insufficiently challenging the eyewitness identification evidence. We reject appellant's contentions, find no other arguable issues, and affirm.

On February 24, 2007, at about 1:15 p. m., appellant attempted to rob Barbara Rodriguez in her general merchandise store in the 1200 block of Ventura Avenue in Ventura. He entered the store, displayed a long knife, and demanded money from her. When Rodriguez threw hot soup on him he ran away. The only disputed issue at trial was identity.

During the incident, appellant stood about six feet from Rodriguez. He was not previously known to her. He wore large sunglasses and a hooded sweatshirt. Rodriguez saw that appellant was about five feet four inches tall, slim and Hispanic. He had a long, thick black and grey "veterano" style mustache. She briefly saw that he was missing some bottom teeth. She could not see his eyes, head, forearms or wrists, but could see the hair over his forehead, which was black and white. When she threw the soup at appellant, he ducked forward and it hit his shoulder before he ran away. She tried to run after him but she slipped in the soup.

Juan Castaneda was driving along the 1200 block of Ventura Avenue just after 1:00 p.m. on his way to visit his sister. He saw a man run out of a building with food spilled on his back. Castaneda was suspicious and saw the man turn the corner, get into an older model white Chevy Blazer and drive away quickly.

Castaneda saw that the first three digits of the license plate were 2DLU or 2DLI. He was unable to describe the man and did not feel he could identify him if he saw him.

Ventura Police Officer Sarah Starr interviewed Rodriguez just after the crime and thought that Rodriguez's description fit a man named William Speer, with whom Starr had contact earlier that day. William Speer later turned out to be appellant's brother. Starr showed Rodriguez a photo lineup that included William Speer and other Hispanic men with mustaches. Rodriguez did not positively identify William Speer, but said he looked like the man who tried to rob her except that the man who tried to rob her had darker skin.

Officers located a white Chevy Blazer that was parked in front of a house less than a mile from the store and matched the partial license plate and the vehicle description provided by Castaneda. The owner of the house, Francisco Ramirez, told Starr that the Blazer belonged to appellant who lived in Ramirez's guest house. Appellant was not home. Ramirez said that appellant left the house at about 10:00 that morning in the Blazer, returned about an hour later, left again in the Blazer two hours later (about 1:00 p.m.), returned about an hour after that, and was later picked up by a friend. Starr showed Ramirez a photo of William Speer, and Ramirez identified him as appellant's brother. Officers obtained a warrant and searched the guest house, garage and Blazer. In the Blazer, officers found a traffic citation that identified appellant as the driver of the Blazer 11 days earlier. At trial, Ramirez denied that he had ever seen appellant come or go on February 24, 2007, had ever seen appellant drive a white Chevy Blazer, or had ever known appellant to own a car. Ramirez said that he had known appellant since he was a child and felt close to appellant.

In the guest house and Blazer, officers found items identifying appellant's employer. His employer testified that appellant had worked for about two months but failed to appear for work on February 22 (the day before the crime) and was terminated several days later because he did not return.

Based on the information gathered at appellant's house, Starr showed Rodriguez a new photo lineup that included appellant's photo with five photos of other Hispanic men with mustaches. Rodriguez positively identified appellant as the man who had tried to rob her. Appellant has darker skin than his brother. Appellant is not missing any lower front teeth, but is missing his upper front teeth.

When the case first came on for preliminary hearing, appellant's counsel requested a continuance to allow the parties to conduct a physical lineup in order to test Rodriguez's identification. The court granted a continuance. Just after the continuance was granted, Rodriguez was brought into the courtroom to be ordered to return. Appellant contends that Rodriguez saw him at the counsel table and that this accidental show up tainted her subsequent identification testimony. Appellant's pretrial motion to dismiss, based on impermissibly suggestive photographic lineups and Rodriguez's exposure to appellant at the hearing, was denied.

We first reject appellant's contention that the photographic lineups were unduly suggestive. We independently review a trial court's determination that a pretrial identification procedure was not impermissibly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608.) A due process violation occurs only if the identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (*People v. Cook* (2007) 40 Cal.4th 1334, 1354.) The defendant bears the burden of demonstrating that a photographic lineup was unduly suggestive and unnecessary. If he does, the court considers whether, in the totality of the circumstances, the identification is nevertheless reliable considering factors including the opportunity of the witness to observe, the witness's degree of attention, the accuracy of her prior description, the

level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

Appellant has not demonstrated that the photographic lineup was unduly suggestive. A lineup is suggestive if it causes a defendant to "stand out" from the others in a way that would suggest that he is the sole or most distinguishable choice. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) "[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*Ibid.*) After reviewing the photographic lineups we agree with the trial court that the variations in appearance between the photographed individuals did not cause defendant (or his brother) to stand out in an unduly suggestive manner. Even if it had, the totality of the circumstances demonstrate the reliability of Rodriguez's identification, considering her opportunity to observe him only six feet away, the absence of any distractions in the store during the incident, the detail and accuracy of her initial description to Officer Starr, her level of certainty when she selected appellant in the second lineup, and the fact that her selection was made only hours after the incident. Appellant has not met his burden of showing unfairness of the identification process as "a demonstrable reality, not just speculation." (*People v. DeSantis, supra*, 2 Cal.4th at p. 1222.)

We next reject appellant's contention that he was unfairly deprived of a physical lineup. A defendant may obtain a physical lineup to test eyewitness identification evidence by timely motion and good cause shown. The defendant must demonstrate that the eyewitness identification is shown to be a material issue and there is a reasonable likelihood of mistaken identification which a lineup would tend to resolve. (*Evans v. Superior Court* (1974) 11 Cal.3d 617.) Even upon such a showing, the defendant is not entitled to the physical lineup as a matter of right. The trial court weighs the need for a lineup against the burden it would place upon the prosecution, the police, witnesses and the court. (*Id.* at p. 625.) The decision whether to request a

physical lineup is a matter of tactics and strategy within counsel's authority to control. (*People v. Bloomdahl* (1993) 16 Cal.App.4th 1242, 1248.)

No defense motion for lineup was made or granted. Defense counsel only moved to continue the preliminary hearing to allow counsel to arrange a lineup informally. Appellant's counsel did not render ineffective assistance of counsel when she chose not to move for a physical lineup. Although identification was the only material issue in dispute, a physical lineup was likely to resolve the identification issue in a manner adverse to appellant. As discussed, Rodriguez's identification was reliable and there was substantial corroborating evidence linking appellant to the attempted robbery including Castaneda's observations, the vehicle description, the partial plate, Ramirez' statements to Starr about appellant's comings and goings on the day of the crime, the proximity of appellant's residence to the store, his access to the vehicle in question, and his missing teeth.

We reject appellant's contention that Rodriguez's identification was tainted when she saw him in the courtroom on the day the preliminary hearing was continued. At the time she entered the courtroom Rodriguez had already provided a detailed description of appellant and positively identified him in the photographic lineup. Further, it appears from the record that Rodriguez only saw appellant's back when she was brought into the courtroom. As soon as she entered, the trial judge asked whether this was the eyewitness in question. When he was told that she was, he had her removed almost immediately. He stated on the record that appellant had been facing forward the entire time that Rodriguez was in the courtroom and that Rodriguez could not have seen appellant's face. No one contradicted or clarified the trial judge's statement. At trial, Rodriguez testified that she had not seen appellant's face when she entered the courtroom. Defense counsel (who had been replaced with conflict defense counsel by the time of trial) testified at trial that she had no personal knowledge whether Rodriguez had seen appellant's face in the courtroom.

We have examined the entire record and we are satisfied that appellant's counsel has fully complied with her responsibilities and that no other arguable issues exist. (*People v. Wende, supra*, 25 Cal.3d at p. 441.)

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Edward Brodie, Judge  
Superior Court County of Ventura

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Susan B. Lascher, under appointment of the Court of Appeal, for  
Defendant and Appellant.

No appearance for Plaintiff and Respondent.